IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

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Opinion of Court of Appeals

IN THE

COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

2D CIV. No. 47134

Sup. Ct. Nos. SOC 25617, SOC 27593, SOC 30557

JAPAN LINES, LTD., [sic] et al.,

Plaintiffs and Respondents,

v.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Defendants and Appellants.

APPEAL from a judgment of the Superior Court of Los Angeles County. Hampton Hutton, *Judge.*
Reversed.

JOHN H. LARSON, County Counsel, JAMES DEXTER CLARK, Deputy County Counsel, *for Defendants and Appellants.*

GRAHAM & JAMES, and REED M. WILLIAMS, *for Plaintiffs and Respondents.*

The sole question presented by this appeal upon an agreed statement from a tax refund judgment is whether appel-

lants, the County and City of Los Angeles, may impose an apportioned ad valorem tax upon cargo shipping containers, taxed in Japan, used here essentially exclusively in foreign commerce and owned and controlled by Japanese taxpayers. These taxpayers are six shipping lines incorporated under the laws of Japan which have their principal places of business and commercial domiciles there.

Facts

The facts as stipulated between the parties disclose that the containers at issue are in constant transit save for repair time and time awaiting new cargo. They are only intermittently physically present within the jurisdictions of appellants for an average stay of less than three weeks. They are used exclusively for the transportation of cargo for hire in foreign commerce. They are either full or empty. The full containers are loaded with cargo inbound from or outbound to foreign ports. The empty containers are moved intrastate within California and interstate from California solely to pick up cargo to be carried in foreign commerce or to return the containers themselves to ports (principally Los Angeles) for placement aboard the taxpayers' outbound vessels. The containers are never used for either intrastate or interstate transportation of cargo except in continuation of international voyages.

The Taxpayers' Contentions

Since the judgment under appeal was rendered, our Supreme Court decided unanimously in the case of *Sea-Land Service, Inc.* v. *County of Alameda,* 12 Cal.3d 772, 775-776, that a California county may tax such containers, under circumstances of use essentially identical to those

before us, where the containers were used mainly in foreign commerce[1] but were owned by a shipping company incorporated and commercially domiciled within this country.

The taxpayers contend that the *Sea-Land* decision is not dispositive of this case because, there, Sea-Land conceded that its containers were subject to local taxation within the United States. Its position was that such taxation must be done exclusively at the home port of its vessels. (*Sea-Land, supra,* at 781, 786.) Here, the home ports of the taxpayers' vessels, which are specifically designed to carry the containers at issue, are in Japan. The taxpayers' vessels are likewise registered there rather than in the United States.

The initial position of the taxpayers on this appeal was that under both the home-port doctrine and the most favored nation provisions of the 1953 Treaty between the United States and Japan their containers are not subject to taxation by any jurisdiction except Japan.[2] In this connection, we note that the containers of the taxpayers are subject to property taxation in Japan and have ac-

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[1] The interstate commerce therein involved was via international waters between California and the east coast of the United States. (*Sea-Land, supra,* at 776.) The court made no distinction between the containers used in foreign commerce and those used in intercoastal commerce.

[2] The taxpayers do not now claim though that their cargo containers have not acquired a taxable situs within California. In any event, the following language, used by our Supreme Court in *Sea-Land, supra,* 12 Cal.3d at 778, would appear to be entirely apposite: "While no specific container may be in the county for a substantial period of time, Sea-Land's containers are physically present in the county on every day of the year. Such habitual presence of containers creates a taxable situs, even though the identical containers are not there every day and even though none of the containers is continuously within the county." (Citations omitted.)

tually been so taxed there. Similar containers similarly used in Japan but owned and controlled by steamship companies domiciled in the United States, have not been so taxed there.

At oral argument counsel for the taxpayers advanced a new ground and an additional factual basis for their position that their containers, notwithstanding the continuous use of the containers in the United States within appellants' jurisdictions, are not subject to property taxation by any government except that of Japan. They there argued that the property taxes at issue constitute indirect tonnage duties prohibited by article I, section 10, clause 3 of the United States Constitution and, in support of one of their initial contentions that these taxes are also prohibited by applicable treaties, called our attention for the first time to the existence of the Supplementary Convention of 1964 (15 U.S.T. 1824) to the 1939 Convention between Sweden and the United States on double taxation. (54 Stat. 1759.)

We could disregard this new matter without any consideration thereof because, without any showing of justification therefor, it was presented after the normal briefing process had been concluded. (See *Lotts* v. *Board of Park Commrs.*, 13 Cal.App.2d 625, 636; *Sinclair* v. *Aquarius Electronics, Inc.*, 42 Cal.App.3d 216, 229.) But in the interest of being as fully informed as reasonably possible on the fundamental tax issue presented, we waived this obvious impropriety in the taxpayers' appellate procedure and asked for and obtained from the parties supplemental briefs on the new matter.

DISCUSSION

1. *The Home-Port Doctrine*

The taxpayers concede that in the field of interstate commerce the home-port doctrine has been superseded by the apportionment doctrine, but they argue that it is still extant in the area of foreign commerce where apportionment cannot be substituted except perhaps by treaty or other agreement. Our Supreme Court in *Scandinavian Airlines System, Inc.* v. *County of Los Angeles*, 56 Cal.2d 11, 15, 17, 33, 36-37 (hereafter *SAS*), applied the home-port doctrine to foreign owned, based, registered and taxed airplanes flying exclusively in foreign commerce and using Los Angeles quite infrequently as their sole United States terminus and thereby struck down the apportioned property taxes upon such planes which appellants had imposed.

In *Sea-Land*, though, our Supreme Court criticized the home-port doctrine at length (12 Cal.3d at 781-788) and labeled it "anachronistic". (*Id.* at 787.) It unanimously adopted the view of the minority in *SAS* that the possibility of international double taxation of instrumentalities of foreign commerce, which these containers admittedly are, was no reason to limit the local power to tax them upon a non-discriminatory apportioned basis provided they had (as they did) a taxable situs here. (*Id.* at 786, 787-788.)

2. *The Tonnage Duty Prohibition*

Article I, section 10, clause 3 of the United States Constitution prohibits the imposition by states (and presumably their subdivisions) of tonnage duties. The taxpayers contend that this prohibition invalidates the local property taxes at issue since they in practical effect are tonnage duties upon the cargo containers.

We disagree. In the recent case of *Michelin Tire Corp.* v. *Wages* (1976) —— U.S. ——, —— [46 L.Ed.2d 495, 500], the United States Supreme Court held that the assessment by Georgia of a nondiscriminatory ad valorem property tax against imported tires was not within the constitutional prohibition against the laying of any impost or duty on imports. In support of this holding the court pointed out that imposts and duties "are essentially taxes on the commercial privilege of bringing goods into a country," while nondiscriminatory ad valorem property taxes of the kind before us are taxes by which a state apportions the costs of its general services among the beneficiaries thereof (*Michelin, supra,* at 504) and that the words "imposts" and "duties", as used in 1787, clearly meant only "exactions upon imported goods *as imports.*" (Emphasis added.) (*Id.* at 506, 502.) This being so, the taxes at issue may not be regarded as tonnage duties prohibited by article I, section 10, clause 3 of the United States Constitution.[3]

3. *The Treaty Question*

The taxpayers contend that the local taxation at issue violates certain treaty obligations of the United States and is therefore invalid under the supremacy clause of the United States Constitution (art. VI, cl. 2). (*SAS, supra,* 56 Cal.2d 11, 37.) In support of this contention

[3] In *Sea-Land, supra,* 12 Cal.3d at 789, our Supreme Court expressly rejected the contention that the similar cargo containers therein involved were exempted from local property taxation by the immediately preceding clause of the United States Constitution. According to that decision the protection against local taxation afforded by that clause extended only to goods and commodities in the import-export stream and not to the containers which were merely a means of transport suitable for repeated use.

they point out first, that the aforementioned 1953 Treaty between the United States and Japan (4 U.S.T. 2063) contains most favored nation provisions with respect to the ownership and possession of movable property and taxes. (Art. IX, § 2; art. XI, § 3; art. XXII, § 2; 4 U.S.T. 2071, 2072, 2079.) They then note that in the just-mentioned *SAS* case our Supreme Court held that the terms of the previously mentioned 1939 Convention between the United States and Sweden respecting double taxation (54 Stat. 1759) prevented appellants herein from generally taxing Swedish-owned property, including particularly airplanes (56 Cal.2d at 39) and, therefore, the Japanese-owned containers before us are likewise exempt from taxation by appellants pursuant to the just-mentioned most favored nation provisions of the 1953 Treaty between the United States and Japan. The *SAS* court based its holding largely on the provisions of article XIII, subdivision 2 of the Swedish Convention (54 Stat. 1766), applying generally apparently to movable property, but the taxpayers argue that their containers are also exempt from local property taxation by appellants under other provisions of the aforementioned Swedish Convention (arts. IV and XIII, subd. (1)(b) (54 Stat. 1761, 1766) exempting instrumentalities of foreign commerce (i.e., ships and airplanes). Finally, the taxpayers argue that by reason of the modification made in the Swedish Convention by the aforementioned 1964 Supplementary Convention thereto (15 U.S.T. 1825) the local property taxation of appellants at issue is precluded by the provision in the convention prohibiting nonreciprocal taxation.[4]

[4] The Supplementary Convention, among other things, replaced paragraph 7 of its protocol (54 Stat. 1777) with a new paragraph 7, reading as follows:

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We reject the foregoing argument totally. We do not think that either the holding of the *SAS* case or the Supplementary Convention (which came into existence after the *SAS* decision) invalidates appellants' nondiscriminatory ad valorem taxation of these containers. The *SAS* holding on its facts prohibits only local taxation of foreign owned, based and registered *airplanes*. (56 Cal.2d at 42.) It does not apply to cargo containers as such. The taxpayers seek to extend this holding nevertheless and the relevant treaty prohibitions as well by describing both the airplanes involved in the *SAS* case and the containers involved here as instrumentalities of commerce. This generic description of ships and airplanes does not appear, in the relevant provisions of the 1939 Convention between Sweden and the United States. Furthermore, the *SAS* court did not view the airplanes there involved as instrumentalities of commerce, but instead as intrumentalities of communication, whose activities in this country were confined to the port of entry. (See 56 Cal.2d at 33.) In any event, so far as the convention with Sweden is concerned, then Justice Traynor pointed out in his dissent in the *SAS* case that, properly interpreted, this treaty does not apply to local property taxation at all. (56 Cal.2d at 47-48.)

The same thing, however, cannot be said with respect to the Supplementary Convention thereto. But in advising ratification by the United States of this convention,

"7. The citizens of one of the contracting States shall not, while resident in the other State, be subject therein to other or more burdensome taxes than are citizens of that other State residing in its territory. The term 'citizens' as used in this paragraph, includes also all legal persons, partnerships, and associations created or organized under the laws in force in the respective contracting State. In this paragraph the word 'taxes' means taxes of every kind or description, whether Federal[,] State, or municipal." (15 U.S.T. 1831-1832.)

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the United States Senate did so on the basis of a report from its Foreign Relations Committee, which stated that the replacement paragraph in its protocol (which we quoted in footnote 4) merely restated "for the sake of clarity" the requirement of its predecessor paragraph of nondiscriminatory tax treatment as between citizens and noncitizens (Tax Conventions and Protocols with Luxembourg, the Netherlands, Sweden and Japan, Report of the Senate Foreign Relations Committee, Ex. Report No. 10, 88th Cong., 2d Sess. 1964, p. 65).[5]

Admittedly, the taxation at issue in this case does not violate this requirement.

DISPOSITION

The judgment is reversed.

Certified for Publication

COBEY, *J.*

We concur:

ALLPORT, *Acting P.J.*
POTTER, *J.*

[5] In determining the effect of an international agreement as domestic law, a court of the United States is to some extent required to take into account domestic sources in the formation of an international agreement such as committee reports indicative of the meaning that the United States Senate has attached to an international agreement in cases where the agreement, as a matter of internal law, requires the assent of the Senate (Rest. 2d, Foreign Relations Law of the United States (1965) § 151, com. (b)(i) pp. 462-463, compare Traynor, J., dissent, *SAS*, *supra*, 56 Cal.2d at 48).